

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN**

ADAM KANUSZEWSKI, et al,  
*Plaintiffs,*

Case No.: 18-cv-10472

v.

Hon. Thomas L. Ludington,  
District Court Judge

MICHIGAN DEPARTMENT OF  
HEALTH AND HUMAN  
SERVICES, et al,  
*Defendants*

Hon. Patricia T. Morris,  
Magistrate Judge

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**RESPONSE TO BIOBANK/YANCEY  
DEFENDANTS' MOTION TO DISMISS**

NOW COME Plaintiffs, by counsel, and requests Defendants Michigan Neonatal Biobank and Dr. Antonio Yancey's collective motion to dismiss [ECF Nos. 15, 17] be immediately denied as moot. On April 30, 2018, Plaintiffs filed their First Amended Complaint adding and/or revising allegations, adding newly discovered facts, attaching additional exhibits, and adding an additional claim against the Biobank. **ECF No. 26.** Fed. R. Civ. P. 15(a)(1)(B) allows a party to amend a pleading as a matter of course within 21 days of being served a motion under Rule 12(b). "An amended complaint supersedes an earlier complaint for all purposes." *Calhoun v. Bergh*, 769 F.3d 409, 410 (6th Cir. 2014). As the undersigned understands it, "when an amended complaint is filed, the prior complaint is superseded and rendered moot," and then "motions directed at the superseded pleading generally are to be denied as moot." *Tiffany v. Mich Dep't. of Health and Human Servs.*, 2015 U.S. Dist. LEXIS 126368, at \*2 (E.D. Mich, Sep. 22, 2015)(LUDINGTON, J.)(citing *Smith & Nephew Inc. v. Fed. Ins. Co.*, 113 F. App'x 99, 102 (6th Cir. 2004) and *Mize v. Blue Ridge Bank*, No. 8:12-CV-2763-JMC-JDA, 2013 WL 1766659, at \*1 (D.S.C. Feb. 12, 2013) (collecting cases));<sup>1</sup> see also *Ling v. Twp of Richland*, 2015 U.S. Dist. LEXIS 10831, at \*3 (ED Mich, Jan. 30, 2015)(same).

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<sup>1</sup> *Tiffany* is attached as **Exhibit A**; *Ling* is attached as **Exhibit B**.

Based on this Court's prior established practice under *Tiffany* and *Ling*, the motion to dismiss [**ECF Nos. 15, 17**] seeking dismissal against the original pleading [**ECF No. 3**] should be denied and these Defendants must now either answer the First Amended Complaint [**ECF No. 26**] or file a new motion to dismiss. If the Court desires any other process,<sup>2</sup> this Court is requested to direct the parties on how to proceed.<sup>3</sup> Otherwise, the hearing date of July 25, 2018 should be cancelled light of the filing of the First Amended Complaint.

### RELIEF REQUESTED

WHEREFORE, the motion to dismiss pursuant to Rule 12(b)(6) [**ECF Nos. 15, 17**] should be denied as moot. If the Court desires any other process, the Court is requested to so direct the parties.

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<sup>2</sup> In *Ling*, for example, the Court provided the local government defendants the option to file a notice on the docket indicating its intent for the original motion to still be considered if those parties believed its motion to dismiss, as currently filed, can be appropriately directed at the Amended Complaint. Perhaps this Court would be prepared to offer the Biobank Defendants this same option. If so, the Court is asked to so direct the parties.

<sup>3</sup> Plaintiffs are prepared to address the erroneous arguments of the Biobank Defendants should this Court desire to address them despite its normal dismiss-as-moot process outlined in *Tiffany*.

Date: May 2, 2018

RESPECTFULLY SUBMITTED:

/s/ Philip L. Ellison

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**CERTIFICATE OF SERVICE**

I, the undersigned attorney of record, hereby certify that on the date stated below, I electronically filed the foregoing with the Clerk of the Court using the ECF system which will send notification of such filing to all counsel or parties of record.

Date: May 2, 2018

RESPECTFULLY SUBMITTED:

/s/ Philip L. Ellison

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